

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU
May 16, 2014

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	:	
	:	
PHH CORPORATION,	:	ORDER DENYING WITHOUT
PHH MORTGAGE CORPORATION,	:	PREJUDICE REQUEST FOR
PHH HOME LOANS LLC,	:	SUBPOENA FOR DEPOSITION OF
ATRIUM INSURANCE CORPORATION, and	:	VINCENT BURKE
ATRIUM REINSURANCE CORPORATION	:	

On January 29, 2014, the Consumer Financial Protection Bureau (Bureau) filed a Notice of Charges Seeking Disgorgement, Other Equitable Relief, and Civil Money Penalty in this proceeding. The hearing commenced on March 24, 2014, in Philadelphia, PA, was not yet complete when it adjourned on March 28, 2014, and is scheduled to recommence on May 28, 2014.

On April 22, 2014, Respondents filed a rebuttal expert witness disclosure for Vincent Burke (Burke). PHH Corporation, 2014-CFPB-002, Document 104. On May 7, 2014, the Office of Enforcement (Enforcement) filed a Request for Issuance of Subpoena for Deposition of Vincent Burke (Subpoena Request). PHH Corporation, 2014-CFPB-002, Document 129. On May 9, 2014, Respondents filed Objections to the Subpoena Request (Objections). PHH Corporation, 2014-CFPB-002, Document 132. On May 15, 2014, Enforcement filed a Reply (Reply) under seal. PHH Corporation, 2014-CFPB-002, Document 142 (under seal).

Rule 210 of the Bureau's Rules of Practice for Adjudication Proceedings (Rules) governs expert discovery. 12 C.F.R. § 1081.210. A party may depose an expert witness, and the deposition shall be conducted in accordance with Rule 209(g), which also applies to fact witnesses. 12 C.F.R. §§ 1081.209(g), 210(d). Rule 209(g) specifies that the requesting party shall pay the cost of the transcript, but it does not specify how much, if anything, must be paid to the witness as a witness fee. See 12 C.F.R. § 1081.209(g). Rule 116 states that the Bureau shall pay witnesses subpoenaed for deposition the same fees "as are paid in the United States district courts in proceedings in which the United States is a party, but the Bureau need not tender such fees in advance." 12 C.F.R. § 1081.116. One rule applicable in district court is that a party taking an expert's deposition must pay the expert a "reasonable fee" for expert witness depositions, "unless manifest injustice would result." Fed. R. Civ. P. (FRCP) 26(b)(4)(E). Enforcement argues that FRCP 26(b)(4)(E) is in tension with 28 U.S.C. § 1821, which sets a \$40 daily witness fee regardless of the nature of the witness' testimony. See Reply at 2-4 (citing 28 U.S.C. § 1821(b)).

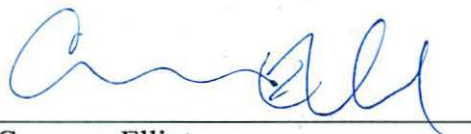
Rule 116 incorporates FRCP 45(b)(1), which requires tender of mileage and one day's witness fee upon service of a subpoena, except that no such tender is required when the subpoena is issued on behalf of the United States. 12 C.F.R. § 1081.116; FRCP 45(b)(1). Although it does not explicitly say so, Rule 116 may also incorporate FRCP 26(b)(4)(E), which requires a reasonable fee for experts, and 28 U.S.C. § 1821, which sets a fixed fee for any witness. See 12 C.F.R. § 1081.116; FRCP 26(b)(4)(E); 28 U.S.C. § 1821. The parties take the position that Rule 116 does not directly incorporate FRCP 26(b)(4)(E), because it applies only to fact witnesses, although Respondents argue that I should apply FRCP 26(b)(4)(E) anyway. Subpoena Request at 2; Objections at 1, 4. In any event, under Rule 209(g), no fee to Burke is explicitly required; under Rule 116, assuming it applies to expert depositions, Burke is entitled to a reasonable fee which need not be tendered in advance; and 28 U.S.C. § 1821 does not specify when a fee is payable. See 28 U.S.C. § 1821; 12 C.F.R. §§ 1081.209(g), .116.

The record is insufficient to determine how much Enforcement should pay Burke, if anything. Assuming Rule 116 incorporates FRCP 26(b)(4)(E), there is case law holding that an expert's usual fee is presumptively reasonable. See Snook v. City of Oakland, No. 07-14270, 2009 WL 928753, at *3 (E.D. Mich. Mar. 31, 2009). But there is also case law holding that courts employ a multi-factor test to evaluate the reasonableness of an expert deposition fee. See Mathis v. NYNEX, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996). Although I may in the end determine that Burke's usual fee is reasonable, I cannot determine this without at least affording Enforcement the opportunity to show that it is not, by addressing the factors recited in Mathis.

More importantly, there is no authority for Respondents to condition Burke's deposition on Enforcement's agreement to pay Burke's usual hourly rate. Objections at 1-2. First, although the deposition fee required by the Rules, if any, is a matter of first impression, the Rules definitely do not give Respondents the right to unilaterally decline to make their expert available without an agreement from Enforcement. Second, under any reading of the Rules, Enforcement need not pay or tender any fee in advance. Enforcement is entitled to depose Burke, and if the parties find themselves in a fee dispute, the deposition must take place and I will resolve the fee dispute later.

Accordingly, I see no need for a subpoena yet, and the Subpoena Request is DENIED WITHOUT PREJUDICE. The parties have been professional and civil to one another so far, and they are demonstrably capable of cooperating in setting up expert witness depositions. I expect the parties to continue to be cooperative in that regard. If the parties cannot reach an agreement on the date, time, and place of Burke's deposition, I will preside over his deposition, which will be held at a time and place to be determined, but not before the hearing recommences.

SO ORDERED.



Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission